

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, et al.,

Plaintiffs,

V.

THURSTON COUNTY BOARD OF
EQUALIZATION, et al.,

Defendants.

CASE NO. C08-5562BHS

ORDER DENYING
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs' Motion for a Preliminary Injunction (Dkt. 2). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file, heard oral argument of counsel, and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL BACKGROUND

On September 18, 2008, Plaintiffs Confederated Tribes of the Chehalis Reservation (“Tribe”) and CTGW, LLC, filed a complaint against Defendants Thurston County Board of Equalization; equalization board members John Morrison, Bruce Reeves and Joe Simmonds; Thurston County Assessor Patricia Costell; and Thurston County. Dkt. 1. Plaintiffs allege that Defendants are violating the U.S. Constitution as well as federal common law by imposing a personality tax on Plaintiffs’ facility, the Great Wolf Lodge. *Id.* ¶ 1.

1 Plaintiffs also filed a Motion for Preliminary Injunction. Dkt. 2. Plaintiffs request
2 that the Court issue an injunction to “enjoin Defendants from: (1) seeking to collect,
3 collecting, or enforcing the collection of the personality tax against Plaintiffs; and (2)
4 proceeding to further litigate the case of *CTGW, LLC v. Patricia Costello, Thurston*
5 *County Assessor*, No. 07-1110.” *Id.* at 22. On September 29, 2008, Defendant Thurston
6 County Assessor responded. Dkt. 13. On October 3, 2008, Plaintiffs replied. Dkt. 18.
7 On October 16, 2008, the Court held a hearing on the preliminary injunction motion and
8 heard oral arguments from counsel. Dkt. 21.

9 **II. FACTUAL BACKGROUND**

10 **A. The Lodge**

11 The Tribe occupies a reservation at the confluence of the Black and Chehalis
12 Rivers in Southwest Washington (“Reservation”). *Confederated Tribes of the Chehalis*
13 *Indian Reservation v. State of Washington*, 96 F.3d 334, 338 (9th Cir. 1996). The
14 Reservation, which was created by Secretarial Order in 1864, was set aside for “the use
15 and occupation of the Chehalis Indians.” 1 Kappler, *Indian Affairs, Laws and Treaties*
16 901-04 (2d ed. 1904). The Tribe has approximately 800 members, which include persons
17 descended from the Upper Chehalis, the Lower Chehalis, Cowlitz, Satsop, Qualioqua and
18 other aboriginal tribes of Southwest Washington. Dkt. 3, Declaration of Chairman
19 Burnett, ¶ 5 (“Burnett Decl.”). The Reservation has a land area of approximately 4,200
20 acres (about 7.022 square miles) in southeastern Grays Harbor and southwestern Thurston
21 Counties. *Id.*

22 Approximately five years ago, the Tribe purchased 43 acres near the I-5 freeway,
23 Exit 88, Highway 12, in Grand Mound, WA. Burnett Decl, ¶ 7. That property was
24 subsequently converted to non-contiguous federal trust property and is currently held in
25 trust by the United States for the benefit of the Tribe. *Id.*; *see also id.*, Exh. B at 2.

26 In 2005, the Tribe and Great Wolf Resorts Inc., a non-Indian corporation with
27 water park expertise, formed a limited liability company, CTGW,

1 LLC, under Delaware law, for the purpose of building and owning Great Wolf Lodge
2 Grand Mound (“Lodge”). *Id.* ¶ 8. The Lodge is located on 39 of the 43 acres that are
3 held in trust for the Tribe and consists of a hotel, conference center, indoor water park and
4 other improvements (“Improvements”). *Id.* ¶ 9. The Tribe leases the property to CTGW.
5 *Id.*, Exh A., U.S. Dept. of the Interior Business Development Lease (recorded by the
6 Bureau of Indian Affairs on July 2, 2007) (“Lease”). Under the CTGW LLC operating
7 agreement, the Tribe has a majority “proportionate share” of CTGW’s profits of 51%, and
8 Great Wolf receives the remaining 49% of CTGW’s profits. Burnett Decl. ¶ 11.

9 Plaintiffs claim that “[u]nder this unique structure, the Tribe is both the owner-lessor of
10 the property and the majority-interest owner of the lessee.” Complaint, ¶ 22.

11 **B. State Taxation**

12 In Washington, “personal property,” for purposes of taxation, includes “all
13 improvements upon lands the fee of which is still vested in the United States.” RCW
14 84.04.080. A county may enforce such taxes by placing liens on the assessed
15 improvements and then selling them at a tax sale. RCW 84.60.020.

16 Plaintiffs claim that “[i]n 2007, the Thurston County Assessor determined the
17 value of the Improvements for taxation in 2008 as partially completed.” Complaint, ¶ 32.
18 Plaintiffs allege that the assessor “then reduced that value by the Tribe’s 51% ownership
19 interest in CTGW, to a 2007 taxable value of \$10,115,462, and then assessed CTGW a
20 personal property tax based on the 49% interest of Great Wolf in CTGW.” *Id.* At oral
21 argument, counsel agreed that the 2007 assessed taxes were approximately \$90,000.
22 Plaintiffs also allege that the assessor has “stated her intent to assess the Improvements at
23 full completion at their full value in 2008 for 2009.” *Id.*

24 Plaintiffs claim that “[s]olely to preserve its rights, the Tribe timely appealed the
25 County’s tax to the Thurston County Board of Equalization, which is an administrative
26 board.” *Id.* ¶ 35 (citing *CTGW, LLC v. Patricia Costello, Thurston County Assessor*, No.

1 07-1110). The Tribe, however, is not a party in that action and its only involvement in
2 that action seems to be as a member of the limited liability company CTGW.

3 **III. DISCUSSION**

4 **A. Jurisdiction**

5 As a threshold matter, the Court recognizes that “[i]f the court determines at any
6 time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R.
7 Civ. P. 12(h)(3). Plaintiffs have presented questions to the Court in the areas of
8 jurisdiction and abstention that are far from clear. For the purposes of the instant motion
9 only, the Court finds that it has jurisdiction over this action. The parties should be aware
10 that the Court may reconsider its assertion of subject-matter jurisdiction as the case
11 progresses and the record is more fully developed.

12 In their complaint, Plaintiffs claim that the Court “has jurisdiction over this action
13 pursuant to 28 U.S.C §§ 1331, 1362 and 1367.” Complaint, ¶ 2. The Confederated
14 Tribes of the Chehalis Reservation is a federally recognized Indian Entity. 73 F.R.
15 18554. In its complaint, the Tribe and CTGW seek a permanent injunction that would
16 “enjoin Defendants from seeking to collect, collecting or enforcing the collection of the
17 personality tax against Plaintiffs.” Complaint at 10. Plaintiffs allege that Defendants
18 attempt to impose a tax against them which violates the “U.S. Constitution and laws of
19 the United States, including the Supremacy Clause of Article VI, § 2, and federal
20 common law.” Complaint, ¶ 2. Under these facts and allegations, the Court has
21 jurisdiction over the Tribes’ causes of action under both 28 U.S.C. § 1331 (federal
22 question) and 28 U.S.C. § 1362 (Indian Tribes). The Court assumes jurisdiction over
23 CTGW’s causes of action under 28 U.S.C. § 1367 as they form part of the same case or
24 controversy which involve the joinder of the additional party. *See* 28 U.S.C. § 1367(a).

25 Defendants argue that (1) the Court should abstain from asserting jurisdiction over
26 this action because Plaintiffs have available state remedies in which to raise their federal
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1 claims; and/or (2) the Court is divested of jurisdiction pursuant to the Tax Injunction Act,
2 28 U.S.C. § 1341. Dkt. 13 at 2-3.

3 **1. Abstention**

4 Defendants contend that the *Younger* abstention doctrine applies as a bar to this
5 Court's federal intervention in the state proceeding of *CTGW, LLC v. Patricia Costello*,
6 Thurston County Assessor, No. 07-1110. *See Younger v. Harris*, 401 U.S. 37 (1971).
7 Under the *Younger* abstention doctrine, a federal court should abstain from hearing a case
8 if the following three criteria are met: (1) state judicial proceedings are ongoing; (2) the
9 state proceedings implicate an important state interest; and (3) the state proceedings offer
10 an adequate opportunity to litigate federal constitutional issues. *Ft. Belknap Indian*
11 *Community v. Mazurek*, 43 F.3d 428, 431 (9th Cir. 1994), *cert. denied*, 516 U.S. 806
12 (1995). Abstention, however, is the rare exception to a district court's "virtually
13 unflagging obligation" to exercise jurisdiction. *Id.* at 431.

14 Defendants argue that Plaintiffs have two available state remedies: (1) they may
15 request a tax exemption under RCW 84.48.010; and (2) they may make a "payment under
16 protest" and then bring a state court action to recover the allegedly unlawful tax pursuant
17 to RCW 8.68.020. Dkt. 13 at 2-3. Defendants' argument is unavailing because the
18 current state proceeding neither involves all of the Plaintiffs in this action nor provides
19 the relief that Plaintiffs are seeking in this action. The Tribe has a right to federal court
20 jurisdiction, *see supra*, and that right should not be denied on the basis that the other
21 Plaintiff, CTGW, is seeking relief from a county legislative authority. Moreover,
22 although functionally equivalent, a state tax exemption is not federal immunity from state
23 taxation. Therefore, the Court will not, for the purposes of this motion only, abstain from
24 exerting jurisdiction over this action based on the *Younger* abstention doctrine.

25 **2. Tax Injunction Act**

26 "The district courts shall not enjoin, suspend or restrain the assessment, levy or
27 collection of any tax under State law where a plain, speedy and efficient remedy may be
28

1 had in the courts of such State.” 28 U.S.C. § 1341 (“Tax Injunction Act”). The Supreme
2 Court, however, has held that the Tax Injunction Act does not bar the district court’s
3 jurisdiction over a suit under 28 U.S.C. § 1362. *Moe v. Confed. Salish & Kootenai*
4 *Tribes*, 425 U.S. 463, 474-75 (1976). The Ninth Circuit has held that the exception to the
5 Tax Injunction Act under § 1362 does not apply to either private Indian-owned entities,
6 *Amarok Corp. v. Nevada, Dep’t of Taxation*, 935 F.2d 1068, 1070-1071 (9th Cir. 1991),
7 or to semi-autonomous tribal entities. *Navajo Tribal Utility Authority v. Arizona Dept. of*
8 *Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979) (plaintiff was a “subordinate economic
9 enterprise” of the Navajo Tribe).

10 In this case, Plaintiffs present a unique situation in that one Plaintiff is an
11 recognized tribe whereas the other is a corporation that is partially owned by a recognized
12 tribe and partially owned by a private corporation. It remains unclear how a district court
13 should apply the Tax Injunction Act and the § 1362 exception to the Act over this
14 particular joinder of parties. For example, in *Navajo*, the Ninth Circuit rejected the
15 argument that “since [the plaintiff was] ultimately controlled by and closely related to the
16 Tribe itself, it should be treated as a tribe for jurisdictional purposes.” *Navajo*, 608 F.2d
17 at 1232. The court stated that “[t]o the extent that [the semi-autonomous tribal entity’s]
18 interests are identified with the Tribe’s, the Tribe itself will be able to protect those
19 interests, should Its leadership decide to do so.”

20 In this case, the Tribe’s leadership has decided to protect its interest. While the
21 Ninth Circuit did not hold that a tribe’s involvement *would* confer jurisdiction over a
22 tribe’s and a corporation’s claims, the Tribe’s involvement in this action is a significant
23 factor in favor of the Court asserting jurisdiction over Plaintiffs’ claims. Moreover, the
24 Court is unaware of any binding or persuasive authority holding that Plaintiffs, as joined,
25 are barred by the Tax Injunction Act from pursuing their claims in this Court. Therefore,
26 the Court finds that Plaintiffs meet the § 1362 exception to the Tax Injunction Act and the
27 Court has subject-matter jurisdiction over this action.

1 **B. Preliminary Injunction**

2 The basic function of injunctive relief is to preserve the status quo pending a
3 determination of the action on the merits. *Los Angeles Memorial Coliseum Com'n v. Nat'l*
4 *Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). Under the traditional standard, a
5 preliminary injunction will issue if “(1) the moving party will suffer irreparable injury if
6 the relief is denied; (2) the moving party will probably prevail on the merits; (3) the
7 balance of potential harm favors the moving party; and (4) the public interest favors
8 granting relief.” *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Alternatively, a
9 preliminary injunction will issue where the moving party demonstrates either (1) a
10 combination of probable success on the merits and the possibility of irreparable injury or
11 (2) that serious questions going to the merits are raised and the balance of hardships tips
12 sharply in the moving party’s favor. *Id.* These alternatives represent extremes on a single
13 continuum rather than two distinct tests. *Clear Channel Outdoor Inc. v. City of Los*
14 *Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

15 Plaintiffs argue that “the *Tribe* satisfies both the ‘serious questions are raised’ and
16 ‘the likelihood of success on the merits’ alternative tests for a preliminary injunction.”
17 Dkt. 2 at 11 (emphasis added)¹. The Court, however, need not reach the merits of this
18 action as Plaintiffs have failed to show either that they will suffer “irreparable injury” or
19 that “the balance of hardships tips sharply” in their favor.

20 **1. Irreparable Injury**

21 Plaintiffs argue that they will suffer irreparable injury in the form of interference
22 with the Tribe’s sovereignty and self governance. Dkt. 2 at 20-21. Plaintiffs cite two
23 Tenth Circuit cases in support of that proposition: *Prairie Band of Potawatomi Indians v.*
24 *Pierce*, 253 F.3d 1234 (10th Cir. 2001), and *Seneca-Cayuga Tribe of Oklahoma v.*
25 *Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). In *Pierce*, the Potawatomi Indians

27 ¹ Plaintiffs consistently alternate between the Tribe’s interests, the Tribe’s 49% interest in
28 CTGW, and CTGW’s interests as a corporate entity.

1 enacted their own vehicle title and registration system. *Pierce*, 253 F.3d at 1237-38. The
2 state of Kansas began issuing citations to owners of vehicles that were registered under
3 the Potawatomi system but were driven on state land and roads. *Id.* The Potawatomi
4 filed a lawsuit in federal court to enjoin the state of Kansas from issuing the citations and
5 for a declaratory judgment that the state recognize the Potawatomi vehicle registrations.
6 *Id.* The district court granted a preliminary injunction and the Tenth Circuit upheld that
7 decision, finding injury to the Potawatomi in the “threat of continued citation by the
8 state.” *Id.* at 1251.

9 In *Seneca-Cayuga*, “the State of Oklahoma sued the Seneca-Cayuga and Quapaw
10 Tribes in separate actions in state court seeking to enjoin the operation of Tribal bingo
11 games, which violate the gaming laws of the state.” 874 F.2d at 710. The tribes then
12 brought an action in federal court seeking declaratory and injunctive relief against the
13 state of Oklahoma. *Id.* The district court entered a preliminary injunction and the Tenth
14 Circuit upheld the injunction finding irreparable injury where the threatened loss of
15 revenues and jobs created the “prospect of significant interference with [tribal]
16 self-government.” *Id.* at 716.

17 In this case, Plaintiffs have failed to show that they will suffer irreparable injury.
18 Assessing a tax against a partially private and partially Indian-owned limited liability
19 company is not an injury. It is informing the company how much it will owe if the tax
20 must be paid. Plaintiffs claim that in order to determine the amount owed, the County
21 must intrude upon the land “to audit CTGW’s records for each tax period.” Dkt. 2 at 21.
22 Plaintiffs cite no authority for the proposition that the auditing of business records is
23 irreparable injury. While the Tribe may have immunity from state taxation, the question
24 of whether CTGW may also have immunity is unclear, and being subject to record
25 inspection is insufficient injury to alter the status quo.

2. Balance of Hardships

Plaintiffs claim that “[i]f the injunction is not issued, the impact on the Tribe will be significant.” Dkt. 2 at 21. Plaintiffs still fail to show how the assessor informing them how much they *may* owe is a significant hardship. Plaintiffs admit that they entered into a “unique structure” and until the Court decides the merits of the immunity issue, there is no reason to consider CTGW as anything but a limited liability company. As such, it should be subject to an assessment of taxes as are the majority of other businesses in this state.

C. Conclusion

The Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1362, and 1367. The Court should not abstain from asserting jurisdiction and is not divested of jurisdiction by the Tax Injunction Act. As for the preliminary injunction, Plaintiffs have failed to show either that they will suffer irreparable injury or that the balance of hardships tips sharply in their favor. As such, Plaintiffs' request for the Court to issue a preliminary injunction is denied.

IV. ORDER

Therefore, it is hereby

ORDERED that Plaintiffs' Motion for a Preliminary Injunction (Dkt. 2) is **DENIED**.

DATED this 21st day of October, 2008.



BENJAMIN H. SETTLE
United States District Judge